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ABSTRACT

When violence involving students erupts at school, journalists generally are faced with obtaining important records to substantiate their stories. To do that, they must cope with privacy laws that protect student records from abuse, state laws that prohibit the release of information about juveniles involved in crime, and the sensitive nature of the records themselves. This research focuses on what scholars have said about the broad area of school violence and three cases in which students were the victims, in California (a case of a teacher molesting a student), Pennsylvania (a hazing incident), and Colorado (release of information about the shootings at Columbine High School). In all these cases, the press was forced to go to court to obtain records and to cope with accompanying delays. (Contains 101 notes.) (Author/RS)

SCHOOL VIOLENCE: GETTING THE RECORDS

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This research focuses on what scholars have said about the broad area of school violence and three cases in which students were the victims, in California, Pennsylvania, and Colorado. In all these cases, the press was forced to go to court to obtain records and to cope with accompanying delays.

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SCHOOL VIOLENCE: GETTING THE RECORDS

During the last decade, violence on school grounds has spawned an array of court cases. Most of them have been lawsuits filed by parents whose children were hurt or killed on school property. But this research found three cases filed by the print press seeking government records to substantiate crime stories in 2000. These cases involve a young Pennsylvania girl's molestation and use in a pornographic video by her teacher, student claims of hazing at school, and a related rape case settlement between a victim and a school district in California, and autopsy reports in the Columbine High School killings in Colorado.

Although the total number of school violence victims has declined in the past few years, violence involving multiple victims at school has not decreased.[1] Gunfire at Columbine High School in Colorado and at schools in Arkansas, Kentucky, and Oregon[2] of the past three years has turned the news spotlight back to school. Statistics documenting overall declines in school violence are of little solace to parents of dead victims and have little meaning for a community like Littleton in the aftermath of the worst school shooting in U.S. history. More recently, two California shootings, one, March 5 at Santana High School in Santee that left two dead and thirteen injured, and another, March 22 at Granite Hills High School that wounded five in El

[1] Fewer school-associated violent deaths have occurred in recent years, but "the total number of multiple victim homicide events has increased," according to the U.S. DEPARTMENT OF EDUCATION AND U.S. DEPARTMENT OF JUSTICE, annual report on school safety (1999).

[2] Two students in combat gear were held in connection with the deaths of four students and a teacher. Twenty-four others were injured during a false fire alarm drill in Jonesboro, Arkansas, March 24, 1998. In West Paducah, Kentucky, a student ambushed a prayer group meeting, and was accused of killing three students and injuring five others. Two students died and twenty-four were injured when another student fired into a crowd gathered in the

Cajon,[3] and a March 30 school parking lot killing in Gary, Indiana,[4] lend credence to the inevitability of school violence and continuous challenges for journalists who need to get records at a time of crisis.

In the 1999 Columbine High School shootings in Littleton, Colorado, two students produced five videos before they killed twelve students and a teacher and then turned their guns on themselves. The Jefferson County Sheriff's Department took possession of the killers' videotapes and school audiotapes as evidence that might provide clues to reasons for the behavior of the killers.[5] Sheriff's officers compiled a lengthy investigative report, and the Jefferson County coroner's office sealed Columbine autopsy records. The media then were faced with obtaining access to these records in a highly charged emotional climate surrounding the untimely death of fifteen people.

The purpose of this paper is to examine access to records cases involving incidents of school violence to explore whether and when reporters can access tapes, videos, and reports. This is important to reporters who want to keep their communities informed about crime.

Literature Review

A review of the scholarly literature reveals topics from student privacy rights to school compulsory attendance policies. Little material exists, however, about press access to records in

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school cafeteria in Springfield, Oregon, May 21, 1998. *See* Laura Beresh-Taylor, *Preventing Violence in Ohio's Schools*, 33 Akron L. Rev. 311 (2000).

[3] Jeff Adler and William Booth, 2 *Students Die in California Shootings; 13 Are Injured; Classmate, 15, Is Dead,* WASH. POST, March 6, 2001, at A1 (visited March 30, 2001) http://www.washingtonpost.com>; Caitlin Rother, 90 Seconds of Gunfire -- and Panic; An Accounting of the Events at Granite Hills High, SAN DIEGO UNION TRIB. March 26, 2001, at A1 (visited March 30, 2001) <http//:www.sandiegounion.com>.

[4] William Claiborne, *One Dead in Indiana School Shooting*, WASH. POST, March 30, 2001, at A1 (visited March 30, 2001) http://www.washingtonpost.com>.

[5] *The Media Response* [paper prepared by the Jefferson County Sheriff] (visited Oct. 6, 2000) <http://www.denverpost.com/news/colreport/Columbinerep/pages/MEDIA_TEXT.htm>.

cases involving students who wield weapons -- fists, pencils, staple removers, knives, swords, chains, and guns -- that leave victims on school premises. In these articles, scholars have analyzed school district attempts to ensure the safety of their students because of threats of violence as school.

Three scholars, Mary Hermann, Theodore Remley Jr., and Marc A. Stanislauczyk, have examined the gradual erosion of student rights at school due to growing fear of drug use and school violence. In a New York case,[6] the court had to decide whether the report of a switchblade knife taken from a high school student during a drug search should be suppressed because the student claimed her Fourth Amendment rights had been violated. "The court considered the reasonableness of the search by balancing the intrusiveness of the search against the severity of the possible danger."[7] Courts are divided about what constitutes foreseeable harm and whether schools are responsible when students are injured, Hermann and Remley said. The school policy was to search students periodically for weapons when they entered the school building or randomly when the search area became congested.[8] Some school districts have adopted metal detector or random or "suspicionless searches."[9]

Hermann and Remley also have written about the liability of educators when students are harmed. Few have actually been found liable by the courts. "Yet, courts have consistently found

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[6] People v. Dukes 580 N.Y.S.2d 850 (1992).

[7] Mary A. Hermann & Theodore P. Remley, Jr., *Guns, Violence, and Schools: The Results of School Violence--Litigation against Educators and Students Shedding More Constitutional Rights at the School House Gate*, 46 Loy. L. Rev. 429 (2000).

[8] *Id.*, at 393.

[9] *See* Roseann Kitson, High School Students, *You're in Trouble Now: How the Seventh Circuit Has Expanded the Scope of Permissible Suspicionless Searches in the Public Schools*, Wis. L. Rev. 851 (1999). Also *see* John J. Bursch, *The 4 R's of Drug Testing in Public Schools: Random is Reasonable and Rights Are Reduced*, 80 Minn. L. Rev. 1221 (1996).

that educators are responsible for taking reasonable precautions to provide a safe environment for the students in their care" and have added that the care should be the kind that "an ordinary and prudent person would exercise under the circumstances."[10] The courts have further found, according to Hermann and Remley's article, that the school effectively becomes the parent once it takes over physical custody.[11] Another scholar asserted that some school districts prepare for potential problems by examining their liability in the event of future violence.[12]

In one case in which inadequate supervision and "constructive knowledge of danger" were alleged, Maynard v. Board of Education,[13] a New York student was hit by a flying pencil in a classroom. Flying objects were not unusual at the school. In fact, they were an ordinary occurrence.[14]

Hermann and Remley also noted that, four years before the Arkansas, Kentucky, and Oregon school shootings, the U.S. Court of Appeals for the Fifth Circuit wrote that "the epidemic of violence in American public schools is a relatively new phenomenon, but one that has already generated considerable caselaw [*sic*]."[15] In addition, schools and law enforcement agencies are taking threats at school more seriously than before, and as a result, First and Fourth

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[10] *Id.*
[11] In Garcia v. City of New York (646 N.Y.S.2d 5091996) a five-year-old child was sexually molested when he was sent to the bathroom unescorted, and the court found that the incident was preventable by proper supervision, *supra* note 5 at 392.
[12] *See* Susanna M. Kim, editor, *Liability in the Public Schools after Deshaney: The "Special Relationship" between School and Student*, 41 UCLA L. Rev. 1101 (1994).
[13] Maynard v. Board of Education, 663 N.Y.S.2d 717, (App. Div. 1997), *supra* note 5 at 393.
[14] *Id.*
[15] Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 199 (5th Cir. 1994).

Amendment[16] guarantees for students are less certain than they were in the 1980s. For example, one New York school district passed a regulation forbidding "gang related activities," including displays of symbols, signals, and signs, in response to students who brought weapons to school and participated in gangs.[17]

According to Stanislauczyk, the third scholar who wrote about the erosion of student rights, a Vernonia, Oregon, middle school did not allow James Acton, a seventh grader, to participate on the football team because he refused to submit to drug testing and his parents declined to sign a consent form. When the Actons asked for a declaratory judgment and injunctive relief in U.S. District Court, the court held that the random drug testing used by the school district passed constitutional muster under the Fourth Amendment, and denied the Actons' claim.[18] "The Court of Appeals for the Ninth Circuit, without dissent, reversed the District Court, holding that the school's policy violated the Fourth Amendment. The Court of Appeals used a four-part test to evaluate the reasonableness of the search."[19]

Another scholar, Wendy Mahling, wrote about dress codes. When students do not fit into a type of school profile of appropriate dress, the potential for violence escalates, some educators contend. In an effort to curb school violence, some schools restrict certain types of dress. "In public schools where violence is the perceived problem, dress codes tend to prohibit gang-related

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[16] U.S. CONST. amend. I. The First Amendment to the Constitution proclaims that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. IV. The Fourth Amendment to the Constitution provides : "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[17] Stevenson v. Davenport Community Sch. Dist., 110 F.3d 1303, 1305 (8th Cir. 1997).

[18] *See* Marc A. Stanislauczyk, *An Evenhanded Approach to Diminishing Student Privacy Rights under the Fourth Amendment: Vernonia School District v. Acton,* 45 Cath. U. L. Rev. 1041 (1996).

clothing, such as jewelry, insignias, baseball caps, gloves, and certain colors of clothes, as well as expensive clothing,"[20] or clothing with buttons or writing.[21] The codes fall within constitutional limits "because of school officials' broad powers to control the educational environment."[22]

In a famous 1969 case, the U.S. Supreme Court stated that the suspension of several students for wearing black armbands to recognize the suffering of those for and against the Vietnam war violated the First Amendment.[23] It was considered landmark law for preserving student rights. Now, however, reliance on the reasonableness test may mean the legal pendulum swings backward when student rights are paramount.

Mahling said that some states have considered the double-edged sword of compulsory attendance. While all students who obey attendance laws have access to education, students of questionable character or those plagued by psychological or emotional problems may be more likely to become violent, endangering others.[24]

Author Lynn M. Daggett wrote about student privacy rights at school. She described the Family Educational Rights and Privacy Act (FERPA), also known as the Buckley Amendment, and how it restricts access to student education records maintained by schools in the United

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[19] *Id.*
[20] *See* Wendy Mahling, *Secondhand Codes: An Analysis of the Constitutionality of Dress Codes in the Public Schools*, 80 Minn. L. Rev. 715, 717-18 (1996).
[21] *Id.*, at 740.
[22] *Id.*, at 736.
[23] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. (1969), Mahling, *supra* note 19.
[24] *Id.*

States that receive federal funds.[25] Daggett pointed out that the law, a "Congressional afterthought,"[26] is fraught with shortcomings:

> Buckley itself provides for enforcement solely through filing complaints with a federal office. There is no timeline for processing these complaints, no administrative hearing provision, and no framework for judicial review. There are no remedies for parties injured by Buckley violations and the only sanction available against schools has never been imposed.

According to Daggett, Congress intended, through the amendment, to create meaningful access for parents without placing a heavy burden on school districts.[27] But from a parental viewpoint, Buckley falls short because parents have no redress for Buckley Amendment violations, and the right to copy a record for a fee is not included in parental access. But more significantly, prompt access is not required. Clearly, in the case of school violence, this is a disadvantage.[28] Among other things, Buckley records include records of former and currently enrolled students.[29]

Scholars have discussed the benefits of school-mandated uniforms, searches, and the use of metal detectors to discourage violence at school. They have addressed the erosion of student privacy rights and a chipping away of First and Fourteenth Amendment rights in the interest of

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[25] *See* Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, Catholic Univ. L. Rev. (1997).

[26] *Id.*

[27] The amendment includes this definition: "Any recorded information that is created or maintained by a school, school employee or a person 'acting for' a school, that is directly related to a particular student, is a record for Buckley Amendment purposes;" *Id.* at 14.

[28] Buckley defines reasonable access time for parents as no later than 45 days after a parent's request for a record, Daggett, *supra* note 24.

[29] The Buckley Amendment lists permanent recordings, such as tapes, films, pictures, and computer files, in its records definition, *Id.* at 13, 16.

24 *See* Kathleen M. Cerrone, *The Gun-Free Schools Act of 1994: Zero Tolerance Takes Aim at Procedural Due Process*, 20 Pace L. Rev. 131 (1999).

keeping the school safe. They have examined how the courts decide whether school officials are liable when their students are hurt or when they die. They have talked about the down side of compulsory attendance at public schools where children may be at risk of physical harm because students who belong to gangs or who are unbalanced are in their classes and locker rooms. They have even written about zero tolerance for troublemakers.[30] But scholars have largely ignored what happens when the press wants access to records related to school violence. This paper will attempt to remedy that.

Research Questions and Methodology

This research project will address these research questions:

1. When have reporters been successful in obtaining access to government records related to incidents of school violence? Why?
2. When have reporters been unsuccessful in obtaining access to government records related to incidents of school violence? Why?
3. What guidelines are suggested when reporters seek such records in the future?

The methodology used in this paper was searches for relevant material in databases including Legaltrac, Infotrac, and Lexis-Nexis; surveying the web site for the Reporters Committee for Freedom of the Press; searching *Media Law Reporter* from 1990 to November 30, 2000, for cases relating to both records access and privacy; reading scholarly journals, and examining newspaper accounts that mentioned school violence in the United States derived from Lexis-Nexis over the same time period. Articles that failed to state whether the violence occurred on school property were discarded. The school violence is limited to students as perpetrators or victims on school property in the United States. The cases are from the print media.

School Violence -- Getting the Records

The research also involved reviewing court cases from 1990 to Nov. 30, 2000, in state courts. Only three cases, including one in Pennsylvania, one in California, and one in Colorado -- all about the print media -- were found.[31]

In addition, the research included telephone interviews with Tom Kelley, a media law specialist in Denver, Colorado, who represents *The Denver Post*, and two reporters involved in covering the Columbine killings for *The Post,* Kieran Nicholson and Dave Olinger.

Three Access Cases

In the three cases found and examined here, newspapers went to court to get records their editors thought were necessary to bring information to the public. These cases represent different types of records access conflict. In two of the three, courts ruled that newspapers should be granted access, after applying balancing tests to weigh the public interest claimed by media representatives against the privacy interests of those seeking to keep records sealed. The third case, a request by *The Post* and *The News* to obtain autopsy reports of the Columbine High School victims, was appealed to the Colorado Court of Appeals. The cases below are treated in chronological order.

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[31] A total of 394 newspaper articles revealed incidents of violence in classrooms, locker rooms, hallways, and on playing fields belonging to school districts. In the sixty-nine articles included in the study, twenty-nine killings were mentioned, as well as fifty-eight injuries from stabbings, gunfire and fist fights. One article said that parents of a Columbine victim would be granted records access. In the television network's transcript, Daryn Kagan announced, "The parents filing the suit were granted a court order this week to see the records from the sheriff's department investigation of those shootings." Also contributing to the broadcast were Cheryl Preheim, Bill Hemmer, and Jeff Flock; *Columbine Looking to the Future; Victim's Parents Blame Sheriff's Department for Child's Death; Students, Staff to Gather in Remembrance* (Cable News Network morning newscast, April 20, 2000). None of the articles said that a newspaper or broadcast station had gone to court to access pertinent records.

The Pennsylvania Case (1995)

In Pennsylvania, a teacher was accused of sexually molesting a minor child, Baby Doe, his student, on school property. Afterwards, the teacher was convicted in federal court of molestation and of possessing child pornography through a videotape he had made of himself molesting the child.[32] Baby Doe and her family sued the teacher, two school districts, and various school officials for damages stemming from the abuse.[33] Philadelphia Newspapers, Inc. (PNI) filed a motion to intervene to gain access for three reasons that overlap. PNI wanted to gain access to judicial records, to unseal the docket so that its motions could appear on the public docket, and to unseal the entire judicial record of action.[34]

The plaintiffs, Baby Doe and others, opposed any attempt to unseal the record, but not PNI's request to intervene in the case.[35] The federal district court in eastern Pennsylvania declared that the newspaper group's motion to intervene would be granted since it was uncontested.[36]

"In the United States, there is a strong tradition of public access to both criminal and civil trials and the resulting judicial records," the federal court noted in assessing whether to unseal the judicial record. "This tradition is based on both the common law right to access doctrine as well as the First Amendment," the court continued.[37]

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[32] Baby Doe v. Methacton School District, 23 Med. L. Rptr. 1895 (E.D. Pa. 1995).
[33] *Id.*
[34] *Id.*, at 1894.
[35] *Id.*
[36] In granting the motion, the court cited Pansy v. Borough of Stroudsburg, 23 F.3d 772, 780, 22 Med..L. Rptr. 1641 (3d Cir. 1994).
[37] *Pansy* 23 F.3d at 780, 22 Med. L. Rptr. 1641 (3d Cir. 1994).

The presumptive right of access can be overcome when a district court decides that the parties' interest in secrecy outweighs the public's interest in access to public records.[38] But the burden is on the party seeking secrecy to specifically show how its interest outweighs the interest of the public,[39]according to the federal court.

The court further noted that judges should rely on five factors in considering whether to modify a confidentiality order. They are 1. the parties' interest in secrecy, 2. whether the parties who wish secrecy are public entities, 3. the parties' reliance on a standing confidentiality order, 4. potential embarrassment to the parties, and 5. whether the action involves public health or safety.[40]

"Courts should take the least restrictive course when ruling on these matters. So, when courts have found that a wholesale seal is unwarranted, they have instead permitted the use of pseudonyms, or have simply redacted identifying information from an otherwise public record,"[41] the court continued.

The court had entered a confidentiality order sealing Baby Doe's entire judicial record, including the docket, from the public.[42] But PNI sought to modify the order based on the newspaper group's belief that the public interest superseded the plaintiffs' interest in keeping the records confidential.[43]

In an unusual finding, the court said it could find "little if any support for our previous decision to seal the docket from the public," noting that the Third Circuit had held that a court

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[38] See *Doe*, 852 F.Supp. at 1257 (citing *Pansy*, 23 F.3d at 786).
[39] Leucadia, Inc. v. Applied Extrusion Tech., Inc., Inc., 998 F.2d 157, 165, 21 Med. L. Rptr. 1737 (3d Cir. 1993), *Pansy*, 23 F.3d at 786.
[40] *Doe*, 852 F.Supp. at 1257, *Pansy*, F.3d at 786-88, 23 Med. L .Rptr. 1895.
[41] M.P. v. Schwartz, 853 F.Supp. 164, 167-68, 22 Med. L. Rptr. 1789 (D. Md. 1994).
[42] 23 Med. L. Rptr. 1895.
[43] *Id.*

docket should be public, "even if this entails redacting it to omit identifying details."[44] The court then unsealed the docket, stating that PNI's motion to unseal certain docket entries was, therefore, moot, since the complete docket was reopened.[45]

The federal court in Pennsylvania then turned to its previous decision to seal the entire file. PNI maintained that the file should be open because ". . . the public has an interest in learning what knowledge the school districts had when they hired and fired the school teacher, whether any other children were molested by the teacher, whether any decision-makers are still in the decision-making positions with the schools, and whether any school employees were disciplined as a result of the events."[46]

The plaintiffs in the case held a different view. They said that the decision-makers were no longer associated with the boards in either school district, that the teacher had been incarcerated and was no longer a threat to other children, and that plentiful newspaper articles published during criminal proceedings answered the public's remaining questions.[47]

But the plaintiffs' arguments about Baby Doe's future were perhaps more significant. In seeking to keep the records sealed, they contended that Baby Doe continued to attend the same school where she was molested, and furthermore, at school, "the facts of the case are well nown."[48] They further maintained that: "[w]ere Baby Doe to be identified, or were facts disclosed that might lead to her identification, this minor child could sustain emotional upset,

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[44] United States v. Criden, 675 F2d 550, 559, 8 Med. L. Rptr., 1297 (3d Cir. 1982), *Id.*
[45] 23 Med. L. Rptr. 1895.
[46] *Id.*
[47] *Id.*, at 1896.
[48] *Id.*

psychological damage, teasing by fellow students, different treatment by her teacher(s), . . ." She could become a social outcast among her peers.[49]

The plaintiffs pointed out that they are private persons, as well as unwilling victims of a crime. They asserted that the public would be less interested in them than if they had thrust themselves into the public view by seeking publicity.

This court then used a balancing test to decide whether to keep the record sealed or order it opened. "This court agrees that Baby Doe was the victim of a heinous crime and should not be put at risk of suffering any additional harm. Potential embarrassment to her and her family is certainly an issue in this situation," the court said.[50]

"However, the case does involve public entities, and other parents have an interest in learning how their school districts address the issue of sexual molestation by teachers and whether the threat of abuse is taken seriously enough," the court continued.[51]

In tipping the balance in favor of disclosure, the court also found that ". . . no more information relating to Baby Doe has been revealed in the pleadings than in the newspaper articles published in conjunction with the criminal trial."[52] Besides that, the court said that to continue sealing a record, "*current evidence* would be needed to show how public dissemination of the pertinent material *now* would cause the . . . harm they claim."[53]

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[49] *Supra* at note 44.
[50] *Id.*, at 1896, *Pansy*, 23 F.3d at 787.
[51] *Id.*
[52] *Id.*, *Leucadia*, 998 F.2d at 167.
[53] M.P., 853 F. Supp. at 167, 23 Med. L. Rptr. 1896.

The court then found that the plaintiffs had not established that their privacy interest outweighed the public's presumptive right to access the judicial records.[54] And the court ordered the record unsealed, with no need for deletion.

The California Case (1998)

In California, three Rancho Bernardo High School baseball players pleaded guilty to the March 1997 assault of a teammate in the school's locker room.[55] Other students at the school, using the California Tort Claims Act, then filed complaints, claiming they had been victimized by violent hazing at school and that the school district had failed to protect them. The school district settled out of court with one assault victim and failed to disclose the settlement amount and terms to the press or the public.

A trial court, the Superior Court of San Diego County, had decided in favor of the school district that did not produce records with names, addresses and telephone numbers of minors deleted after the newspaper asked for them.[56] The school district then petitioned the court for future guidance in similar situations.

Meanwhile, the *San Diego Union-Tribune* appealed the lower court's decision, seeking records that arose from the broomstick rape and the tort claims of other students.[57] A state appeals court ruled in 1998 that a newspaper publisher may have access to damage claims and a settlement agreement.[58] In explaining its reasoning, the court said the student claims were not

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[54] *Pansy*, 23 F.3d at 786, Search Warrant for Secretarial Area outside Office of Thomas Gunn, 855 F.2d at 574, Med. L. Rptr, 1896.
[55] Poway Unified Sch. Dist. v. Superior Court of San Diego County and Copley Press v. Superior Court of San Diego County, 26 Med. L. Rptr. 1943 (Cal. Ct. App. 1998).
[56] *Id.*
[57] *Id.*
[58] *School district claims, settlement in rape case must be disclosed* (visited Oct. 4, 2000). <http://www.rcfp.org/news/1998/0504c.html>; *Poway*, 62 Cal. App. 4th 1496, Cal. App. LEXIS 318, 73 Cal. Rptr. 2d 777, 26 Med. L. Rptr. 1943; 98 Cal. Daily Op. Service 2736, 98 Journal DAR 3738 *Poway*.

"pupil records" or "educational records," eligible for nondisclosure under California's Public Records Act or the provisions of FERPA.[59] "It defies logic and common sense to suggest that a Claims Act claim, even if presented on behalf of a student, is an "educational record" or "pupil record"[60] within the purview of these exemptions," the appeals court said. Revealing the records would not result in an invasion of privacy for the student involved in the settlement with the school district because the student asked for confidentiality "if possible," and the student victim's attorney had participated in a press conference about the settlement.[61]

The court also noted that the newspaper has a policy of protecting the identity of victims of juvenile offenders and sex crimes. It then went further, recognizing that the facts the *Union-Tribune* wanted are "relevant to a legitimate and important competing public interest in ending school hazing practices potentially endangering many children."[62] The court used a balancing test, just as a different court had done in the Pennsylvania case.

The Colorado Case (2000)

In the case of Columbine, the parents Dylan Klebold and Eric Harris, the two youths who killed fifteen, sought to keep the videos their dead sons had made of themselves from the hands of the public and the press. After the 1999 school slaughter, a district court judge -- nearly a year later -- ordered the release of videotapes to two victims' families. A state trial court judge then mandated the release of a sheriff's preliminary report, videos, and copies of audiotapes of 911 calls made from the high school library while the killings were in progress. On the same date, the

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[59] *Id.*

[60] The court defined pupil record to mean "any item of information directly related to an identifiable pupil, other than directory information, which is maintained by a school district or required to be maintained by an employee in the performance of his duties whether recorded by handwriting, print, tapes, film, microfilm or other means," in *Poway Unified School District*, 26 Med. L. Rptr at 1947 (citing the Public Records Act § 6252, subd (d)).

[61] One who files a tort claim has no reasonable expectation of privacy, the appeals court said, quoting Register Div. Of Freedom Newspapers, Inc., v. County of Orange (1984) 158 Cal. App. 3d 893, 902 (1984).

Jefferson County sheriff released different, edited videotape copies to the public for $25 each. These tapes, intended for emergency response team training, did not show the victims.[63]

In May, 2000, a Colorado appeals court ruled that autopsy reports of the victims should not be made public under the state's open records law because they would cause "psychological harm to the public."[64] *The Denver Post* and *The Rocky Mountain News* had filed motions to intervene in the autopsy records case.

Jefferson County officials used an unusual provision in the Colorado Open Records Act (CORA) to petition the district court to seal autopsy reports of the Columbine shooting victims. Although autopsy reports are generally open in Colorado,[65] Nancy Bodelson, the coroner, and Dave Thomas, the district attorney, joined by other plaintiffs representing families of the victims, asked the Jefferson County District Court about a month after the shootings to seal the records, contending that releasing them would cause "substantial injury to the public interest."[66] After a hearing, District Judge Henry Nieto agreed in a ruling from the bench, and closed the reports. The Colorado Court of Appeals then upheld the lower court decision nearly a year later.

Bodelson and Thomas' petition to seal the records contended:

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[62] *School district claims, supra* note 57.
[63] *County sells instructional video in school shooting* (visited Oct. 4, 2000) <http://www.rcfp.org/news/2000/0427stonev.html>.
[64] *Autopsy reports in Columbine shooting are not public* (visited Oct. 4, 2000) <http://www.rcfp.org/news/2000/0515/bodels.html>. .
[65] Denver Publishing Co. v. Dreyfus; Freedom Newspapers, Inc. v. Bowerman; 13 Med. L. Rptr. 2275; (Colo. App. 1987).
[66] Bodelson v. Denver Publishing Co., (Colo. App. 2000), 28 Med. L. Rptr. 2006, although "substantial injury" is not defined in the Colorado Open Records Act (CORA), the provision to restrict release of autopsy reports is expected to be used "in extraordinary situations," Colo. Rev. Stat. 1999, §38.1715, Freedom Newspapers v. Tollefson, 26 Med. L. Rptr. 2132 (Colo. App. 1998). In addition, the records custodian has the burden of proof, Zubeck v. El Paso County Retirement Plan, 26 Med. L. Rptr. 2332 (Colo. App. 1998), and such exceptions to the CORA must be narrowly construed, Sargent School District No. RE-33J v. Western Services, Inc., 751 P.2d 56 (Colo. 1988).

> Release of graphic autopsy reports of the children of the Parent Petitioners would serve no useful purpose; would add to the media firestorm which these tragic and unfortunate events have created and continue to create; would cause great emotional harm or distress and embarrassment to the Parent Petitioners and the other members of their families; would unnecessarily inflame the members of the general public; would be an invasion of the personal privacy of the Parent Petitioners and their family members; and would do irreparable emotional harm to the Parent Petitioners and their family members with the result that the grieving and healing process which must occur in our community and in the lives of these Parent Petitioners and their families and is now underway would be permanently impeded or defeated.

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In addition, the appeals court reaffirmed the district court belief that disclosure would harm not only families, but the entire community of Littleton, Colorado. ". . . the court found that the losses of these families have so impacted this community that the whole community would feel the same pain the families would feel upon reading the contents of the autopsy reports."[67] The lower court described this assertion as a "unique factor" that supported closing the records.[68]

The Post and *The News* had intervened, joining others in the suit.[69] In contrast to the nondisclosure that the petitioners asked for, *The Post* took the opposite view.[70] The newspaper also asserted that balancing privacy interests with those of open government was necessary. Specifically, *The Post* stated that when the Colorado General Assembly drafted the CORA, it had considered that the "cost" of public access – "including being exposed to gruesome medical and

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[67] 28 Med. L. Rptr. 2010.
[68] *Id.*
[69] *The Post* sought all victim reports, but *The News* only wanted the two reports about Klebold and Harris, the perpetrators of the Columbine shootings, Telephone Interview with Tom Kelley, Attorney with Faegre & Benson LLP, in Denver. Kelley is representing *The Post* in the newspaper's appeal to obtain autopsy reports of Columbine victims. (Nov. 15, 2000).
[70] *The Denver Post* argued that ". . . the trial court did not absolutely bar disclosure in perpetuity," and that the newspaper and others could seek modification of the court order and urge deletion of some facts, if appropriate, and that the court also could consider an in camera review of the autopsy records, *supra* note 66 at 2012.

forensic information that is necessarily included in all autopsy reports – was outweighed by the greater public interest in open government."[71]

In Colorado, reporters rely on the state's open records provisions in attempts to get information when school violence arises. Criminal justice records are a separate part of the Colorado Open Records Act (CORA), and so are autopsy reports. Laws seem to favor reporters' obtaining records in most cases. But when records involve special circumstances, such as untimely and tragic death, provisions in the law tend to permit closure by records custodians. Records of arrests, indictments and other "official actions" by criminal justice agencies are open to inspection by any person, according to Colorado law.[72] But the law is not absolute. Some restrictions apply.

Other records of criminal justice agencies are open for inspection, generally at the discretion of the custodian of the records.[73] Disclosure may be considered "contrary to public interest."[74]

When law officers have a legitimate interest in avoiding disclosure of potential criminal conduct "not ripe for prosecution," full access to police intelligence information may be denied. This information may include taped recordings of an informant's statements.[75] "In general, if a person is not charged, is acquitted or the charges are dismissed, the arrest and criminal information records of that person may be sealed upon the petition of the person in interest."[76]

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[71] The appellate court did not address whether nondisclosure of the autopsy reports violated the First Amendment to the Constitution because *The Post* did not raise the issue at the trial court stage. *Id.* at 2008, 2011.
[72] Colo. Rev. Stat. §§24-72-301, et seq., 21 The News Media and The Law, Summer 1997, 5.
[73] *Id.*, Colo. Rev. Stat. §§24-72-305 (1), Colo. Rev. Stat. §§24-72-305 (5), The News Media and The Law, Summer 1997, 5.
[74] *Id.*, at Colo. Rev. Stat. §§24-72-305 (5).
[75] Pretash v. City of Leadville, 715 P.2d 1272 (Colo. App. 1985), 21News Media and The Law, Summer 1997, 6.
[76] Colo. Rev. Stat. §24-72-308(1)(a)(I).

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The public also may access arrest and criminal files concerning juveniles between fourteen and eighteen in Colorado, when they are charged with committing offenses that would be considered violent if committed by adults.[77] But any record that is deemed confidential or protected from inspection by state statute, federal statute or regulation, or Supreme Court rule, or court order is exempt.[78]

In seeking release of the Columbine autopsy records, *The Post* also said that ". . . the General Assembly has determined that in all cases in which a coroner investigates the cause of death, the autopsy shall be released to the public." In order to justify denial of disclosure, the plaintiffs had to establish that the autopsy reports "contain specific information that, if disclosed, would likely foil an indicated investigative response, *The Post* argued.[79]

Another argument the Denver daily used in seeking to unseal the records was "the unprecedented outpouring of grieving shown by the public at large" after the killings, revealing intense public interest.[80] "This is demonstrated by the memorial service that was held shortly after the event, which was attended by the Governor of this State, the Vice President of the United States, and many state, local, and national dignitaries. There were estimates that the crowd attending this event was 70,000 or more people."[81]

[77] Colo. Rev. Stat. §19-1-119(5).
[78] Colo. Rev. Stat. §24-72-204(1)(a); 21 The News Media and the Law, 6.
[79] Med. L. Rptr. at 2009.
[80] *Id.*, at 2010.
[81] *Id.*

"The grief that's present – the public grief that's present here is also demonstrated by the fact that the President of the United States chose to come here to meet with many of the victims and to attend an additional memorial service," the court said.[82]

The trial court had restricted public inspection and disclosure "unless or until there is a criminal prosecution requiring the disclosure of such autopsy reports or until further order of the trial court."[83] Kelley said those wanting disclosure had "decided to go back in" to seek modification of the court order, and their request for subsequent review had led to a new hearing on a motion asking for disclosure of the records Nov. 30 before Jefferson County District Judge Brooke Jackson.[84]

The attorney said he believes *The Post* had asked for all pertinent records that would shed light on the Columbine shootings. "Different rules apply in a case like this. What you see here is attempts to legislate specially on behalf of the families of the Columbine victims. But there comes a time when Columbine has to take its place among other tragedies in history. We have reached that time. One and a half years have passed. "This is no longer a fresh wound. It's a part of history, and we have to start letting historians see the records."[85]

Interviews with Two *Denver Post* Reporters

Kieran Nicholson Interview

When the sheriff's report came out on May 15, 2000, more than a year after the killings, a CD-ROM contained his department's narrative of events, "portions of the 911 [audio] tapes,"

[82] "The Court also takes judicial notice of the memorial that was established in Clement Park. That memorial was created by literally thousands of persons who brought remembrances to that site. And thousands more visited that site as a way to seek solace for their grief," *Id.*
[83] *Supra* note 78 at 2007.
[84] Kelley Interview, *Supra* note 68.

and videotapes from the school cafeteria, said Kieran Nicholson, a *Post* reporter who wrote some later Columbine stories.[86] The primary reason for the delay in the records release was that "fifteen people were dead, and the department had to interview thousands of people."[87]

In a later development, *The Post*, on November 16, published an article by Nicholson revealing that the Jefferson County attorney's office had gone to court to try to avoid disclosure of the tapes made by the perpetrators before the Columbine killings.

> This involved 3 ½ hours of tapes that are very controversial. My take on it is that Jefferson County wants the courts to become the custodian so they don't have to deal with it. It doesn't surprise me that as unusual and unprecedented as the nature of this case is, some information would be withheld. But quite a bit of information was released.[88]

Dave Olinger Interview

Denver Post reporter Dave Olinger was not as charitable as Nicholson about the role of records custodians in the case of Columbine. One of the paper's writers in the early days of the ongoing Columbine shootings coverage, Olinger and a colleague, after contacting the Alcohol Tobacco and Firearms division of the U.S. Treasury Department, learned that two of the guns used by Klebold and Harris were a Tech 9 handgun and a semi automatic, short-barreled, rifle carbine. Nevertheless, the paper never got a physical record from the federal bureau, only confirmation of some facts the staff already had.[89] "It was nearly impossible to get any records," Olinger continued.[90]

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[85] *Id.*
[86] Kieran Nicholson, *Report sells briskly*, Denver Post (visited Oct. 6, 2000) <http://www.denverpost.com/news/colo518a.htm>.
[87] Telephone Interview with Kieran Nicholson, Reporter, *Denver Post* (Nov. 17, 2000).
[88] *Id.*
[89] Telephone Interview, Dave Olinger, Reporter, Denver Post (Nov. 18, 2000).
[90] City Editor Evan Dreyer, then an assistant city editor, had made a list of records The Post wanted from the sheriff's department, *Id.*

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A television station in New Mexico obtained a "training video" made by firefighters and helicopter news crews[91] and "ran some footage" from it,[92] and *Time* got exclusive rights to videos,[93] while "everybody at *The Post* waited months and months."

One of the things the Denver daily wanted was a diary kept by Harris. "But the sheriff's office essentially said, 'This is an ongoing criminal investigation. The records are not public,' " Olinger continued. The diary was not made public. When the hold on the 911 audiotapes was removed, and some of the tapes were released, "they had been edited by the sheriff's department."[94] "I don't believe we ever did get all the 911 tapes. On one of the tapes, Klebold and Harris came into the library and started shooting. What was released was an "edited version because the complete tape would be too painful for families and survivors."

"There was a teacher dying in one of the science rooms. There were people talking to 911 operators and another teacher on the phone. Someone put a sign up in the window: 'One bleeding to death,' and again, no one came. What were the dispatchers saying to the teacher who was calling for help?" Olinger asked. "And what were the dispatchers hearing from officers at the scene?"

Olinger said the Columbine autopsy reports are important records, too. A rumor had circulated that at least one of the shooting victims, Daniel Petrone, was killed by a police officer,

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[91] *County sells instructional video on school shooting* (visited Oct. 4, 2000) <http://www.rcfp.org/news/2000/0427stonev.html>, May 15, 2000.
[92] *Id.*
[93] Olinger interview, *supra* note 88.
[94] *Id.*

not by Klebold or Harris.[95] "The only way to determine that is to look at the autopsy reports to see what kind of a bullet it was," Olinger said.

The Post's "fruitless request for records" was stymied at every turn by claims of sheriff's officers that they were conducting "an on-going criminal investigation." "But they never indicted anybody except for the poor guy who sold the Tech 9 to Dylan and Eric," said Olinger.[96]

The reporter said that if he ever encounters another incident like Columbine, "We would spend more time with people who hold those records, the investigators, the school officials, the coroners. *Time* magazine scored in part by approaching the sheriff's department with a human interest story about its officials, who eventually coughed up the secret videotapes."[97]

The law was applied narrowly and delays in releasing even heavily edited records dragged on. "Ultimately, it was the same thing as records denial. It was arbitrary. They withheld records because they could and just because they could. After *Time* came out, the sheriff said he'd been tricked."[98]

Discussion and Conclusions

One writer, Jane Amari, said that crime coverage is easy. "There are lots of documents in a central location and public employees to use as sources. And many of the documents are privileged, allowing us to report on them without fear of lawsuit. The best crime stories have what every reporter looks for when he or she sits down to write --

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[95] Howard Pankratz, *Columbine bullying no myth, panel told,* Denver Post (Visited Oct. 6, 2000) <http://www.denverpost.com/news/col1003a.htm>.

[96] "It's the kind of gun Miami drug dealers use in the movies," Olinger said. The Tech 9 was sold with a 30-round magazine. Manufacture of the handgun ceased in 1994, but the weapon had not been banned from resale. On Nov. 7, Colorado voters approved a measure to require background checks for guns sold at gun shows. *Supra* note 88.

[97] *Id.*

drama, conflict, good and evil."[99] But Amari discussed crime coverage in general, not the delicate scenario when school violence occurs. Crime coverage then is not easy.

In sum, reporters have been successful in gaining access to government records related to incidents of school violence when they have gone to court to force the records open. When they have waited for records to open without filing suit, they have not been successful. Even when laws clearly state that records should be open, records custodians feel it is their duty to keep records under wraps in extremely sensitive situations. *Denver Post* reporter Dave Olinger has suggested more and continuous contact with records custodians in cases of school violence.

Against the backdrop of privacy laws to protect student records from abuse, state laws prohibiting the release by investigatory agencies of information about juveniles involved in crime and the sensitive nature of records about school violence, the press is charged with fulfilling its watchdog role over government and providing vital information to the public about crime. Yet, in general, third parties, including the press, cannot access records stemming from school violence without going to court.

Amari did not mention having to force records open. Instead, she said that many newspapers have beat reporters to cover activities of law enforcement and the courts, and suggested that newspapers begin the coverage of victims as a beat.[100] She also noted that newspapers by and large are not agents for change in society. "We often cover trials like horse races; there's a winner and a loser." She added that "Reporters seldom ask, understand or report on why juries, lawyers and judges do what they do. Reporters tend to

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[98] Olinger said he knows *Time* writer Tim Roche and believes that he obtained the videotapes "because he's just a good reporter. He does not go about tricking people." *Id.*

[99] JANE AMARI, American Society of Newspaper Editors Readership Committee, THE LOCAL NEWS HANDBOOK 59 (1999).

[100] *Id.*, at 64.

quote legal documents such as indictments that have more of a sense of legitimacy to them than the denials of the accused."[101]

When reporters want to get records about school violence, some of them may be held by the school. Later, law enforcement agencies take possession of these records to investigate crime. Not surprisingly, access to records created by perpetrators of violence, which may become the property of investigatory agencies, and ultimately, of the assailants' survivors, such as in the Columbine case, may not be clear in access laws.

The abuse of Baby Doe in Pennsylvania, the broomstick rape in California, and the Columbine shootings illustrate legal entanglements surrounding the retrieval of records about school violence in the United States. The courts ultimately decided that the records should be open in two of the three cases here. The media, however, were forced to take legal steps to get the records. And, when the circumstances lead to community-wide fear and grief, as in the third or Columbine case, it is especially difficult to get the records.

There had been speculation that delays in law officer response time may have contributed to the death of teacher Dave Sanders, the Columbine victim who was bleeding to death in the high school science room while the school was under siege. But without the records, how would anyone be able to establish that the speculation was true or false? Rumor and speculation often cause more harm than getting at the facts by releasing the records.

Daniel Petrone's mother believes her son was shot and killed by a police officer and not by Klebold or Harris. Finding out the truth is also of vital importance to the press and the public. If coroners only have to be accountable to themselves, and not to the public, then the public will not learn the truth.

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Records should be the lifeblood of a newspaper, and in cases like these, they also are important to families of the victims of violence at school. Ideally, parents should not have to worry about the safety of their children at school. But this is not an ideal world. Parents' safety concerns, particularly in an uncertain school atmosphere where violence could erupt at any time, should, at the least, be able to count on getting records from schools quickly.

In the future, the press should ask repeatedly for important records, in the hope that they can pry them loose without lodging lawsuits. And the media, even competing media, should pool their resources to demand records before nondisclosure reaches the stage where court action is necessary. A strong, united front in a community where more than one medium is involved may make a difference to records custodians like Sheriff Stone. When negotiation measures fail, however, the press should go to court.

[101] *Id.*, at 62.

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